

No. 12-0441 RS

On November 15, 2013, Ben Hur filed a motion to strike part of the Director's post-hearing brief. On November 19, 2013, the Director filed his response. The basis for Ben Hur's motion is that the Director's written argument contains references to some of the stipulated facts

and written arguments contained in the record of this Commission in *E & B Granite, Inc. v. Director of Revenue*, Case No. 09-0841 RS. Our decision was appealed to the Supreme Court of Missouri, which issued an opinion on February 8, 2011.¹ We are obligated to take the Court's ruling in *E & B Granite* into consideration as precedential to the extent it applies to the record before us in this appeal. The published opinion contains all of the facts necessary to support the Court's holding in that case. Facts or arguments from our record, extraneous to the opinion of the Missouri Supreme Court, are not instructive and do not form the basis for any essential element of our reasoning in this matter. We have taken the Director's arguments as arguments and not as evidence; therefore, we deny the motion to strike portions of his brief.

Findings of Fact

1. Ben Hur is a Missouri limited liability corporation, which was 50% owned by Ben Hur Construction Company at all times relevant to this case.²

2. Ben Hur's primary business is subcontracting with commercial construction companies for the provision of labor, materials, and equipment necessary to furnish and install structural steel beams, plates, angles, and other components in the process of construction of large scale commercial buildings and structures. During the relevant time, Ben Hur would often partner with Ben Hur Construction Company to accomplish installation for these jobs.

3. In order to fulfill its contractual obligations, Ben Hur buys steel beams and steel plates directly from steel mills, at times when the mills are producing the size and shape Ben Hur needs for a particular project, or from steel supply houses that keep inventories of such materials when they are not available from the mills.

¹ *E & B Granite, Inc. v. Director of Revenue*, 331 S.W.3d 314 (Mo. banc 2011).

² Ben Hur Construction Company purchased the other 50% on December 19, 2012 and is now sole owner of Ben Hur Steel Worx, LLC.

4. Once it purchases the steel, Ben Hur may modify the steel beams according to project drawings and specifications by performing various tasks such as cutting them to length, drilling holes and slots in them, beveling the edges, cambering or curving the steel, coping or cutting the steel at an angle, grinding, painting, and attaching other steel pieces, such as angles, clips, or steel plate by bolting or welding.

5. If the steel components it purchases are for a taxable construction project, Ben Hur pays tax on the components. If the project is for a tax-exempt entity, such as a qualified educational institution or health care organization, Ben Hur does not pay sales tax on the purchased materials.

6. Ben Hur maintains a facility in Lemay, Missouri, where it uses machinery and equipment to modify raw steel components by shaping and finishing them. At that facility, large pieces of steel are processed using large saws, drills, grinders, and welding equipment while being moved and transferred by cranes and hydraulic lifts.

7. Typically, Ben Hur buys and prepares steel components for incorporation into large scale commercial buildings.

Proceedings Before the Director

8. On May 3, 2011, Ben Hur filed an application for sales/use tax refunds of amounts it allegedly overpaid. Ben Hur claimed it overpaid sales tax in March, April, May, and June of 2008 in the sum of \$3,250.21. In the same application, Ben Hur claimed it overpaid use tax for the first and second quarters of 2008 in the sum of \$147,165.17. The combined total of the refund of sales and use tax sought was \$150,415.38.

9. On August 23, 2011, Ben Hur filed an application for sales/use tax refunds of amounts it allegedly overpaid subsequent to the time periods covered in its previous application. In the second application, Ben Hur claimed it overpaid sales tax in July of 2008 in the amount of

\$463.40. Also, Ben Hur claimed it overpaid use tax for the third and fourth quarters of 2008 in the sum of \$7,352.54. The combined total of the refund of sales and use tax sought was \$7,815.94.

10. On January 9, 2012, Ben Hur filed an application for sales/use tax refunds of amounts it allegedly overpaid subsequent to the time periods covered in its two previous applications. In the third application, Ben Hur claimed it overpaid sales tax throughout 2009 in the sum of \$3,463.58; that it overpaid in January, March, April, September, October, November and December of 2010 in the sum of \$1,569.24; and that it overpaid in January and February of 2011 in the sum of \$73.46. It claimed overpaid use tax for all four quarters of 2009 in the sum of \$26,383.52 and all four quarters of 2010 in the sum of \$9,263.21. The combined total of the refund of sales and use tax sought was \$40,753.01.

11. On January 23, 2012, the Director issued a final decision denying each of Ben Hur's three applications for sales/use tax refunds.

Conclusions of Law

This Commission has jurisdiction over appeals from the Director's final decisions.³ Ben Hur has the burden to prove that it is entitled to a refund of sales and use taxes erroneously paid and for which it now seeks a refund.⁴ Our duty in a tax case is not merely to review the Director's decisions, but to find the facts and to determine, by the application of existing law to those facts, the taxpayer's lawful tax liability for the period or transaction at issue.⁵

Ben Hur asserts that the Supreme Court's application of § 144.054.2 in the *E & B Granite* decision, has clarified the terms "materials used or consumed" and "products" such that the exemption now applies to taxes it has already paid. Specifically, Ben Hur claims that its

³Section 621.050.1. All statutory references are to RSMo 2000, unless otherwise noted.

⁴Sections 136.300.1 and 621.050.2.

⁵*J.C. Nichols Co. v. Director of Revenue*, 796 S.W.2d 16, 20-21 (Mo. banc 1990).

purchase of materials used to fabricate structural steel for installation in building construction is now exempt from state sales and use tax.

The relevant portion of § 144.054.2⁶ allows a sales and use tax exemption for:

electrical energy and gas, whether natural, artificial, or propane, water, coal, and energy sources, chemicals, machinery, equipment, and materials used or consumed in the manufacturing, processing, compounding, mining, or producing of any product, or used or consumed in the processing of recovered materials, or used in research and development related to manufacturing, processing, compounding, mining, or producing any product.

A statute imposing a tax is strictly construed in favor of the taxpayer and against the taxing authority.⁷

Section 144.020.1⁸, which defines sales tax, provides in relevant part:

A tax is hereby levied and imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state. The rate of tax shall be as follows:

(1) Upon every retail sale in this state of tangible personal property, . . . a tax equivalent to four percent of the purchase price paid or charged[.]

Section 144.610.1, which defines use tax, provides in relevant part:

A tax is imposed for the privilege of storing, using or consuming within this state any article of tangible personal property purchased on or after the effective date of sections 144.600 to 144.745 in an amount equivalent to the percentage imposed on the sales price in the sales tax law in section 144.020. . . .

⁶ RSMo Cum. Supp. 2007. In 2009 the statute was amended to add another section unrelated to the provisions at issue here.

⁷ *President Casino, Inc. v. Director of Revenue*, 219 S.W.3d 235, 239 (Mo. banc 2007).

⁸ RSMo Supp. 2001.

The Missouri Supreme Court has declared that:

Tax exemptions are strictly construed against the taxpayer. ... An exemption is allowed only upon clear and unequivocal proof, and doubts are resolved against the party claiming it. ... Exemptions are interpreted to give effect to the General Assembly's intent, using the plain and ordinary meaning of the words.^{9]}

However, a statute should not be so narrowly construed as to defeat the purpose of the legislature.¹⁰ “Absent statutory definition, words used in statutes are given their plain and ordinary meaning with help, as needed, from the dictionary.”¹¹

Application of *E & B Granite, Inc. v. Director*

The Missouri Supreme Court recognized in *E & B Granite, Inc. v. Director of Revenue* that “[t]here is no definition of ‘product’ in chapter 144.”¹² While the Court essentially agrees with its previous definition of product as an output with a market value, announced in *International Bus. Mach. v. Director of Rev.* in 1997,¹³ it held that the exemption in §144.054.2, enacted in 2007, was intended to be broader than the one stated in §144.030.2(2), which was at issue in the *IBM* decision. In analyzing the more recent exemption provision in *E & B Granite*, the Court found there was an expansion of the application of the product exemption so that the exempt product did not have to be “new personal property intended to be sold ultimately for final use and consumption.”¹⁴ In *E & B Granite*, the Director denied the exemption based on the old paradigm of *Blevins Asphalt Construction Company v. Director of Revenue*, under which fixtures to real property could not be exempted products.¹⁵ But the Court reasoned that in light

⁹*Branson Properties USA v. Director of Revenue*, 110 S.W.3d 824, 825-26 (Mo. banc 2003).

¹⁰*PDQ Tower Services v. Adams*, 213 S.W.3d 697, 698 (Mo. App., W.D. 2007).

¹¹*American Healthcare Management v. Director of Revenue*, 984 S.W.2d 496, 498 (Mo. banc 1999).

¹²331 S.W.3d at 316.

¹³958 S.W.2d 554, 557 (Mo. banc 1997).

¹⁴*E & B Granite*, citing *Blevins Asphalt Construction Company v. Director of Revenue*, 938 S.W.2d 899 (Mo. banc 1997).

¹⁵938 S.W.2d at 901.

of the decision in *Blevins*, the more recent exemption provision in §144.054.2 amended and added to the definition of the products exempted from sales and use tax.

As a result of the expansion of the category of exempt products found in *E & B Granite*, the Court held that the new product – the granite countertops manufactured by the taxpayer – did not cause their manufacturer to lose its exemption solely on the basis that those products became attached to real property once they were installed and therefore affixed to real property.¹⁶ This is the reason Ben Hur seeks a refund of sales and use taxes paid on the materials and items used to produce structural steel beams and supports used in building.

However, structural steel beams, even as modified by Ben Hur in the course of its business, are not products or outputs with a market value, as required for the materials exemption in §144.054.2. Unlike the granite countertops manufactured by the taxpayer in *E & B Granite*, we are unable to conclude, from the record put before us, that there is a market in which fabricated steel pieces, such as those used by Ben Hur, are regularly bought and sold at retail. The company produced no evidence that it modified steel beams and then sold them. The record demonstrates that Ben Hur conducted its business as a party to construction contracts for which it would bid to produce and install structural steel according to the specifications and drawings associated with a particular project. Ben Hur's witness testified that in the event one of the companies that contracts with Ben Hur to modify structural steel components must cancel an order, the company must either compensate Ben Hur for labor and materials or ask Ben Hur to scrap the pieces and give the company a refund.¹⁷ Although the parties in *E & B Granite* stipulated that a portion of the taxpayer's output was sold at retail and therefore exempt,¹⁸ there

¹⁶ 331 S.W.3d at 317.

¹⁷ Tr. 18.

¹⁸ 331 S.W.3d at 315 n.1.

was no substantial evidence presented that Ben Hur ever sold a single beam at retail or ever collected and remitted sales tax on such a transaction. Thus, there is no basis on which we may conclude that anything produced by Ben Hur fits the definition of “product” as an “output with a market value.”

One of the central elements to the holding in *Blevins* was the Court’s reliance on the well-settled principle that construction contractors and subcontractors are the consumers of the ordinary building materials they purchase and use to fulfill construction contracts, and are, therefore, liable for sales and use tax on those materials.¹⁹ Although *Blevins* was issued in 1997, its discussion of this principle cites a long line of cases dating back to 1937.²⁰ Under the principles of statutory construction, which must guide us in this decision, we cannot interpret the plain language of §144.054.2 as overruling the central principle that ordinary building materials purchased for construction are exempt from sales and use tax.

Ben Hur does not purchase structural steel components in order to transform them into substantially new items to be resold at retail. Rather, the evidence on the record demonstrates that Ben Hur buys the steel beams and ancillary hardware in order to fulfill contracts to provide structural steel components that are incorporated into the very core structure of commercial buildings. To the extent that Ben Hur makes modifications to the steel it buys, it does so with the intent to meet the specifications of architects, engineers, and general contractors working together to put up commercial buildings. Put another way, the items that Ben Hur works on in order to fulfill its contracts still remain ordinary building materials that “essentially disappear into a job when used.”²¹ As the Court pointed out in *E & B Granite*, we must presume that the

¹⁹ 938 S.W.2d at 901.

²⁰ *City of St. Louis v. Smith*, 114 S.W.2d 1017 (Mo. 1937).

²¹ *State ex rel. Dravo Corp. v. Spradling*, 515 S.W.2d 512, 515 (Mo. 1974).

legislature was mindful of its previous interpretation and limitation of exemption in *Blevins* when it adopted §144.054.2, but the new provision does not exempt the purchase of building materials by contractors and subcontractors for construction. Therefore, we must presume that no such exemption was intended if it is not found in the language of §144.054.2.

Ben Hur conducts its business on a contract basis and executes its contractual duties by buying structural steel to fit the requirements and specifications of the project it is engaged to help construct. Ben Hur has the tools, machinery, and space required to make certain modifications to the steel parts it buys in order to make the components fit into and become the structure of a finished building. Ben Hur does not resell the materials to the contractor, and it does not render a finished product. In its capacity as a subcontractor, Ben Hur takes part in the “inseparable commingling of labor and materials” that produces buildings.²² The legislature could easily have exempted building materials used in construction from sales and use tax in the plain language of §144.054.2, but such an exemption does not currently exist.

Summary

Ben Hur is not entitled to a refund.

SO ORDERED on April 24, 2014.

\s\ Sreenivasa Rao Dandamudi
SREENIVASA RAO DANDAMUDI
Commissioner

²²114 S.W.2d at 1019-20.